

NO. 87-1

IN THE
SUPREME COURT OF THE STATE OF NEW YORK
OCTOBER TERM, 1987

CHARLOTTE

- against

BOROUGH OF MANHATTAN
COLLEGE,

RESPONDENT'S
OPPOSITION TO
FOR WRIT OF HABEAS CORPUS

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Supreme Court, U.S.

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JOSEPH F. SPANIOL, JR.
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RM, 1987**

CROMAN,

Petitioner,

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TAN COMMUNITY

Respondent.

**BRIEF IN
PETITION
HABEAS CORPUS**

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34 pps

NO. 87-1594

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

CHARLOTTE CROMAN,

Petitioner,

- against -

BOROUGH OF MANHATTAN COMMUNITY
COLLEGE,

Respondent.

RESPONDENT'S BRIEF IN
OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION
PRESENTED

1. Was the complaint properly dismissed following a bench trial, where the defendant met its burden to articulate a nondiscriminatory reason for its rejection of plaintiff, namely her lack of qualification for the position, and plaintiff failed to show that this reason was a pretext for discrimination?

2. Were any of the factual findings by the District Court clearly erroneous?



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- against -

BOROUGH OF MANHATTAN COMMUNITY
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COUNTER-STATEMENT OF THE CASE

Having received a right to sue letter from the Equal Opportunity Commission, plaintiff commenced this action, on August 14, 1984, pursuant to Title VII of the Civil Rights Act, alleging that defendant Borough of Manhattan Community College ("BMCC") had discriminated against her based on her race and sex. A bench trial was held in the United States District Court, S.D.N.Y.,



before Judge Constance Baker Motley. The facts adduced at trial are, in relevant part, as follows:

Plaintiff's Case

Plaintiff Charlotte Croman was appointed an instructor in the English Department at BMCC in 1964 and attained the rank of full professor in 1972 (A464-474).¹ Plaintiff alleged that she applied for the position of Associate Dean of Faculty on October 27, 1972, in response to a posted notice (A53). By letter dated November 22, 1972, Dean of Faculty, Myron Pollack, informed plaintiff that she did not have the special

¹ Numbers in parentheses, preceded by A, refer to pages of Joint Appendix A filed in the Second Circuit. Numbers preceded by B, refer to pages of Joint Appendix B, also filed in the Second Circuit.

qualifications for the job of Associate Dean of Faculty, stating (A83):

The newspaper advertisement which appeared in the New York Times announcing that applicants were being sought for this position noted that the qualifications were: "Doctorate degree, five or more years experience as teacher or college administrator of instructional programs, experience as researcher into instructional programs, expertise in current research methods, etc." The responsibilities of the position are listed as: "responsible for initiating and implementing applied research on instructional problems."

As you can see the emphasis is on identifying candidates with a strong background in applied research and from your record, which shows a lack of expertise in the areas of statistical analysis and research design, it would appear that you do not possess the specific background desired for this position.

According to plaintiff, sometime thereafter she learned from another Dean,

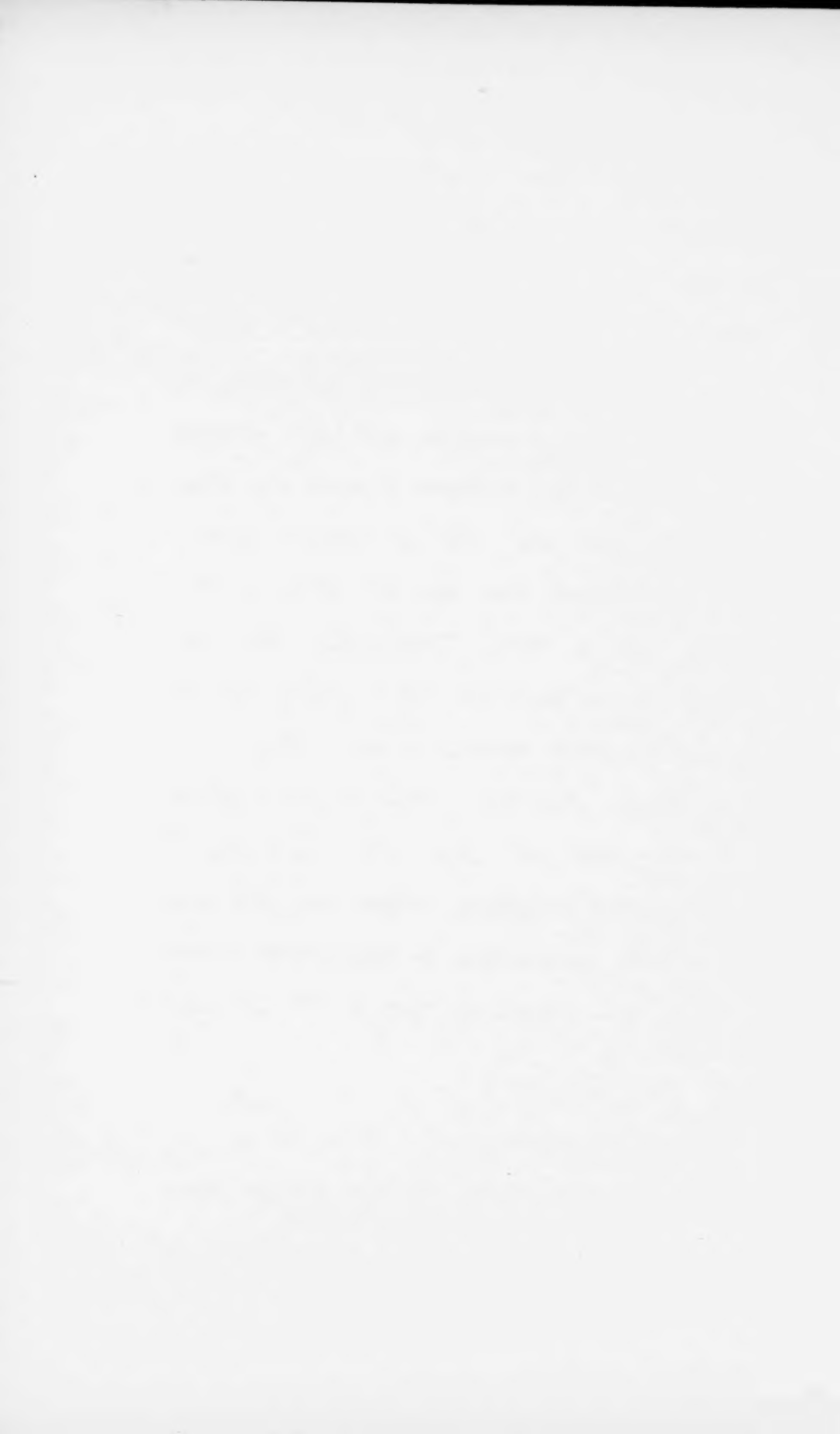
Dr. Eric James, that Dean Pollack had offered the job to Dr. Frances Minor, a woman, at the time that plaintiff applied for the position (A63, A93).² Plaintiff alleged that the offer to Dr. Minor was not bona fide and was made to keep plaintiff out of the picture (B19). In support of this theory, she pointed to certain changes in the terms proposed to Dr. Minor. By letter dated October 27, 1972, College President Edgar Draper informed Dr. Minor that he had recommended her for appointment as a Professor in the Department of Public Service and Urban Affairs, with tenure, and with an assignment as Associate Dean of Faculty for Instruction (A80). In the third paragraph of the letter, President Draper

² Plaintiff testified that, after learning of the offer to Dr. Minor, she confronted Dean Pollack who told her that the position had not been offered to any one (A467).



stated that "the appointment is of a temporary nature" (A80). A corrected letter to Dr. Minor, dated November 2, 1973, deleted the third paragraph (A81). Following a vote by the search committee, in June of 1973, the position was again offered to Dr. Minor who declined because the offer at that time was without tenure (A64). Plaintiff alleged that the job offer to Dr. Minor was a sham, contending that the administration knew that Dr. Minor would not accept the offer without tenure (B37). Dr. Eric James, who was a Dean of the College at the time of plaintiff's application,³ testified that President Draper told him that he did not want women in the administration (A484), and specifically that he did not want

³ In 1973, Dr. James left the College when his resignation was requested (B66).



plaintiff for the position of associate dean because she is female (A485).

Plaintiff alleged a history of discrimination against women at BMCC. She pointed to the report of the Chancellor's Advisory Committee on the Status of Women at the City University of New York (A243-A459) which dealt with the treatment of women throughout the municipal community college system, and also submitted some statistical studies of her own, pertaining to the rate of advancement of women at BMCC (A186-A188, A495). At plaintiff's request, the Court agreed to take judicial notice of the judgment for plaintiffs in Melani v. Board of Higher Education, 561 F. Supp. 769 (S.D.N.Y. 1983), a case involving claims of discrimination by female faculty members in the community college system citywide (A497). Plaintiff also offered the testimony of a number of friends and colleagues who



stated that women advanced more slowly than men with comparable qualifications (A487-A491). Duncan Pardue, a former Special Assistant to the Board of Higher Education and a social acquaintance of Dean Myron Pollack (T293-T295),⁴ testified on behalf of plaintiff that Dean Pollack, who was having marital problems (T295), did not like women and referred to them as "cunts and bitches" (A486). On cross-examination, Mr. Pardue admitted that he never heard Dean Pollack refer to any of the women at the college in these terms (B67).

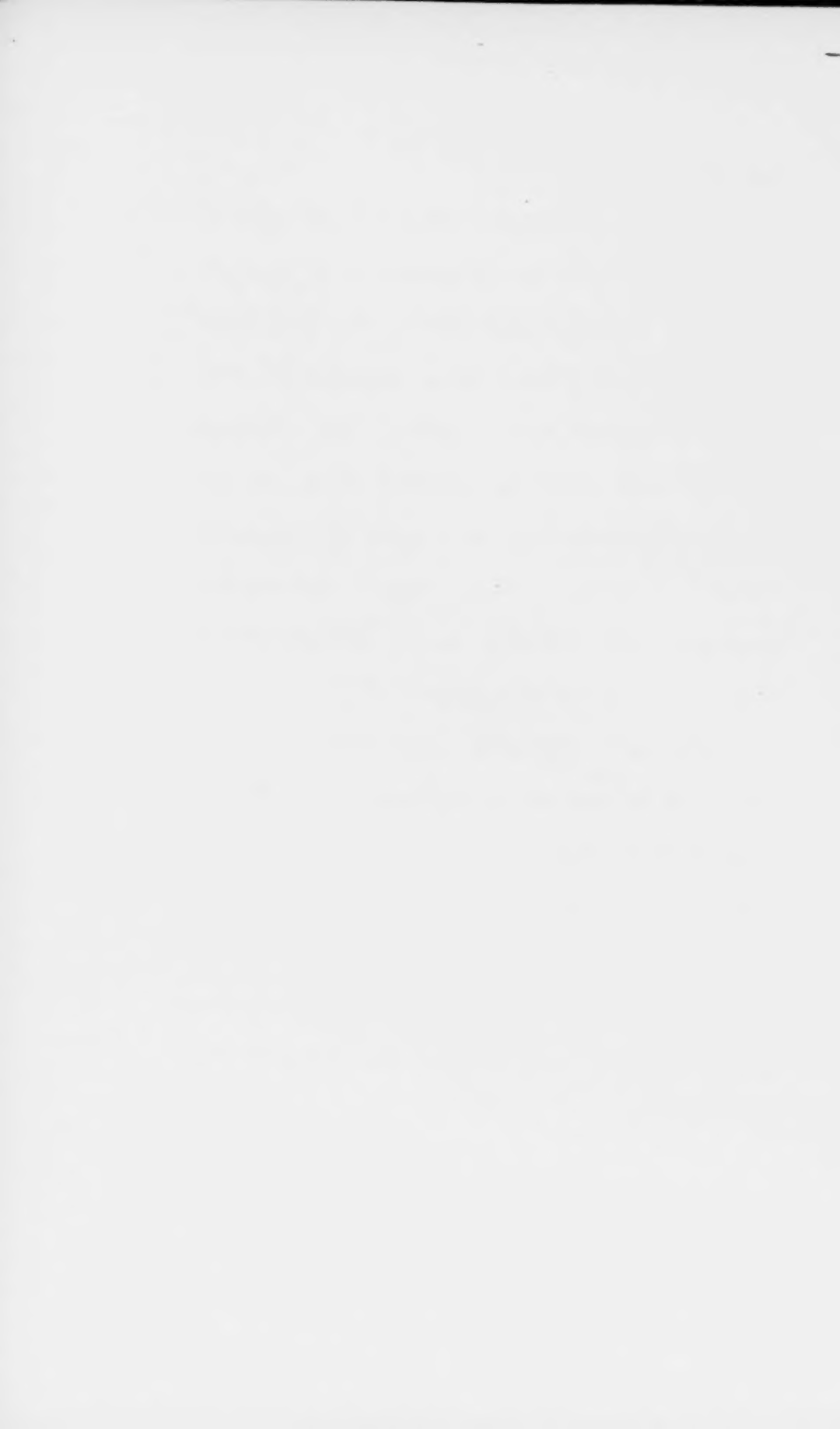
During the trial, plaintiff dropped her claim of race discrimination, conceding that she did not have "sufficient proof" (A481).

⁴ Numbers in parentheses, preceded by "T," refer to the transcript, of the trial before Judge Motley not included in either volume of the Joint Appendix.



Defendant's Case

Dr. Myron Pollack, who at the time of the trial resided in California and had no present association with BMCC, was the Dean of Faculty at BMCC from September 1972 through August 1974 (A501). Dr. Pollack testified that when he arrived at BMCC the academic program was in a state of transition because, under the Open Admissions program, the student body was changing from a predominantly white to a predominantly minority population (B90). One year to one and a half years before Dr. Pollack had taken the job, the Chancellor's office had mandated that a separate remediation program be established (B103, B104). Due to the failure of Dean James to institute such a program, Dr. Pollack and



President Draper⁵ were under tremendous pressure to establish a remediation program (B103). Dr. Pollack testified that the situation was so serious that he and President Draper believed themselves in danger of losing their jobs if they failed to set up an effective remedial program soon enough (B103). Dr. Pollack testified that he needed people with the background to set up a remediation program "expeditiously and skillfully" (B104).

Very soon after he became Dean in September 1972, Dr. Pollack personally invited Dr. Frances Minor to submit her application (A514, B105). Dr. Pollack, who had worked with Dr. Minor at New York University (B100), believed she had the background and experience for the job

⁵ Former President Draper was not available to testify at the trial (T638-640).

(B104). Dr. Pollack testified that, although one of Dr. Minor's fields of expertise was early childhood education, she had an excellent reputation from a two year remediation project which she administered at Yale University involving people of all ages in the New Haven community (B104). Dr. Minor was interviewed by President Draper who offered her the job on October 27, 1972 (A80-A81). Dr. Minor took the offer under advisement (T530).

While the offer was pending to Dr. Minor, a search committee was formed because there was great pressure to fill the position and Dr. Minor was undecided (T531). The Committee put an advertisement in the New York Times, and the Department of Personnel put advertisements in two other papers (T532). The advertisement, on September 24, 1972, was for three related positions, Associate Dean of Faculty

(Instruction), Assistant Dean of Faculty (Remediation) and Assistant Dean of Faculty (Instructional Media). The position of Associate Dean was advertised as follows (A191):

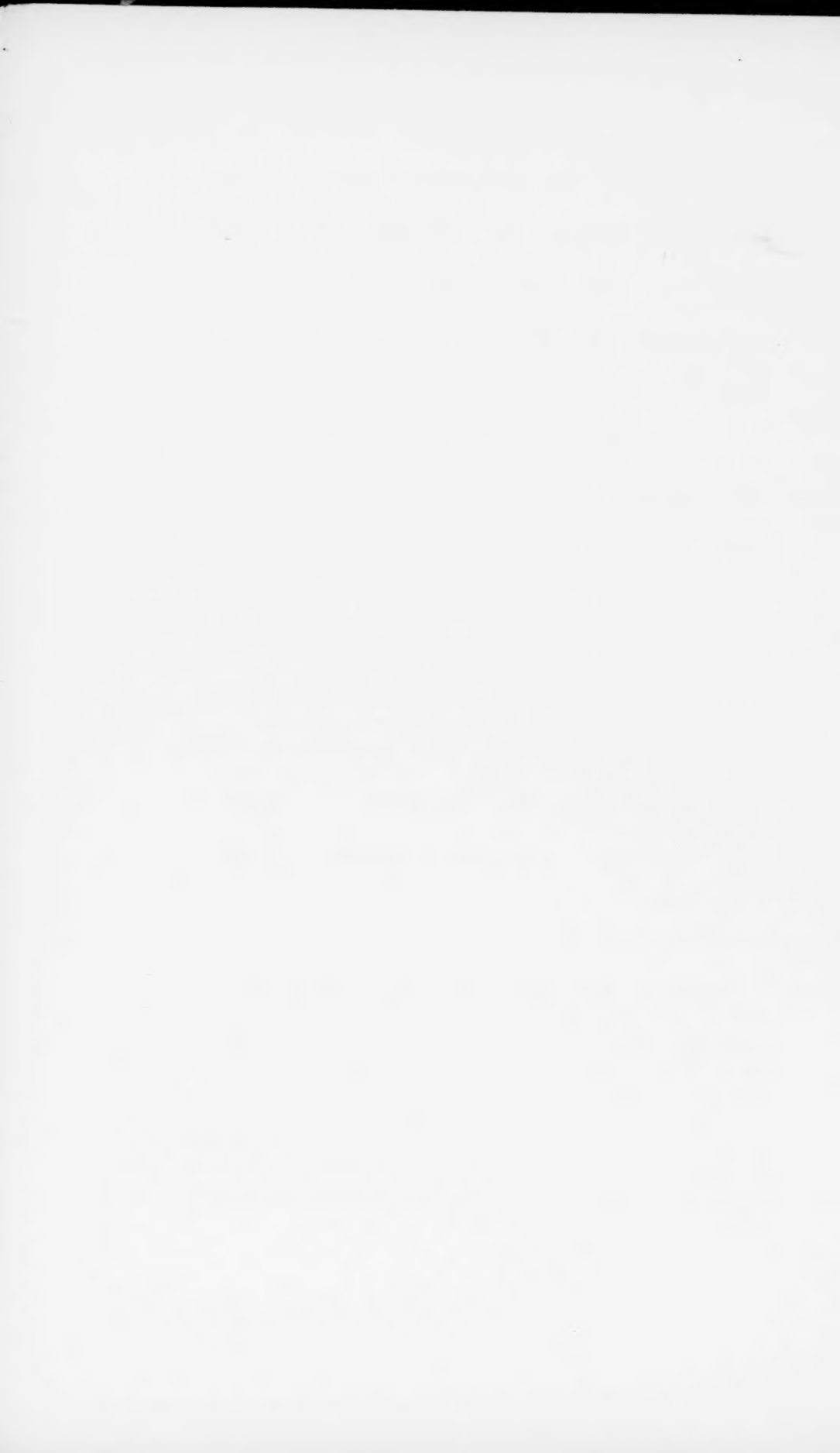
responsible for initiating and implementing applied research on instructional problems. Qualifications: Doctorate degree, five or more years experience as teacher and college administrator of instructional programs, experience as a researcher into instructional problems, expertise in current research methods, knowledge of community college curricula, record of innovative achievement.

In response to the advertisement, the college received approximately 30 to 40 applications (A513). Out of that group, Dr. Pollack screened out those applicants who were obviously not qualified (A514). He provided the search committee with fifteen or twenty applications which were winnowed down to eight or ten candidates who were actually

interviewed by the committee (A505, A517). After interviewing Dr. Minor, the search committee, on May 30, 1973, voted unanimously to offer the position to her (A85).⁶

Dr. Pollack testified that he did not send plaintiff's application to the search committee because she was not qualified (A517). Specifically, she lacked a background in statistical analysis (A183, B108) which, although not directly mentioned in the advertisement, was implicit in the requirement that the candidate be familiar with current research design (A542).

⁶ Gustave Manasse, who was employed by BMCC in the spring of 1973, testified for plaintiff that he served on the search committee (A575). The only person he recalled interviewing was Dr. Minor (A575), although he admitted that he did not make it to all the committee meetings (A577). Asked if his recommendation to hire Dr. Minor was made in good faith, Dr. Manasse responded "Absolutely" (B171).



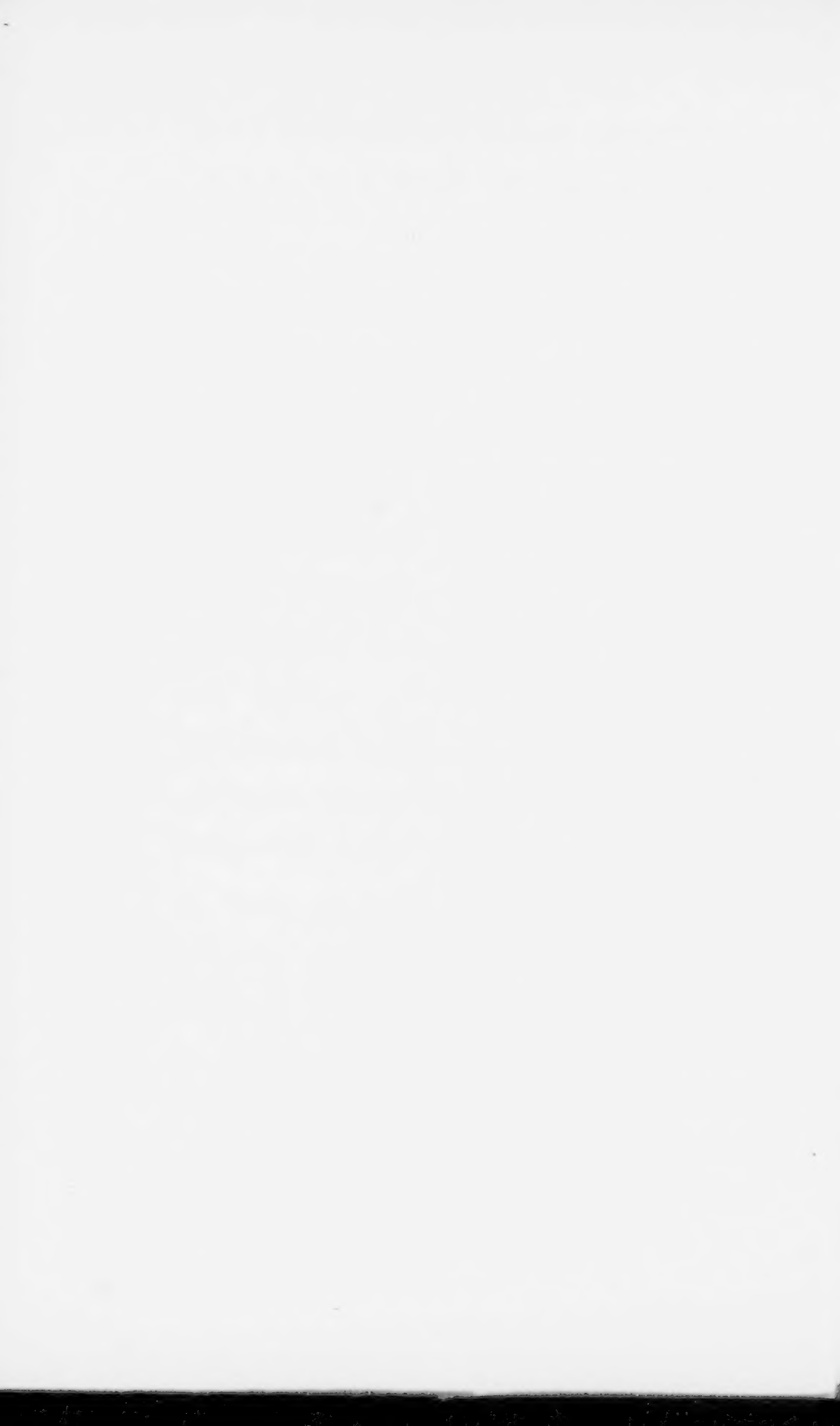
Further, plaintiff was deficient in leadership and administrative experience; Dr. Pollack noted that although plaintiff served temporarily as the coordinator of the evening session, she was not asked to return to this position at the conclusion of the summer session (B108).

Dr. Minor did not accept the May 1973 offer because it did not include tenure (A530). Dr. Pollack testified that after consultation with President Draper, a second search committee was appointed (A534). Dr. Pollack had received an application from Dr. Mervyn Keizer, a black man, approximately one month before the second search committee met (A538). The second search committee voted to offer the position to Dr. Keizer (A86), who accepted the position and served for one year, 1973 to 1974 (A189). Dr. Pollack testified that Dr Keizer, who had a background in classical philology, had

decided to change the direction of his career from teaching classical languages at the graduate level to working with poorly prepared students (B95). Dr. Kelzer worked for two years at Federal City College, a four year open admissions college with the emphasis on the first two years (B119), where he set up a successful remediation program "almost singlehandedly" (A554, B95). Although Dr. Kelzer did not have expertise in statistical analysis, this was no longer a necessary qualification for the job, as in the interim, Dr. LaChica, a statistician and research design specialist, had been hired to handle that aspect of the program (A554).

Dr. Frances Minor testified that she was retired from New York University where she had been a professor (B139). During a two year leave from NYU, she worked on a Ford Foundation grant program establishing

a relationship between the Yale Child Study Center and the New Haven public schools (B142). When Dr. Pollack contacted her, she was "excited" at the idea of working with the faculty and "improving the quality of education available to young people" in the open admissions program (B145). After she made her formal application, she received a letter from President Draper offering her the job at a salary of \$25,000 with tenure (B148). Another paragraph of the letter said that the position was temporary (B148). Dr. Minor testified that she questioned President Draper about the temporary position and about the salary which, although higher than her salary at NYU, was for a full year of work, compared to nine months at NYU (B148). President Draper explained that the professorship in Urban Policy and Studies would be tenured, while the Deanship would be temporary



(B148). A second, corrected letter in November 1972, deleted the word "temporary" but did not offer a higher salary (B148). Dr. Minor testified that she could not accept the offer at that time because BMCC wanted her to start in February and she had a one year contract with NYU (B149).

Dr. Minor testified that sometime in the spring of 1973, she received a call from Dr. Pollack and interviewed with at least half a dozen faculty members (B151). Shortly thereafter, she received a third letter offering her the position at \$28,000, but without tenure (B151). She spoke to President Draper who explained that tenure had been frozen in the community college system city wide (A569). Dr. Minor declined the position because she was not willing to give up her tenured professorship at NYU for an untenured position (A569). Dr.

Minor testified that she never had any reason to believe that the offers from BMCC were made to her other than in good faith (A589).

Opinions Below

In an order and judgment entered August 11, 1987, the District Court dismissed the complaint, finding that plaintiff had failed to demonstrate that she had been subject to sex discrimination. In its findings of fact, the Court concluded that defendant's offers of the position to the two other candidates were bona fide and not a pretext for discrimination against plaintiff (A7):⁷

Both Drs. Minor and Kelzer were qualified for the position of Associate Dean of Faculty for Instruction. The offers

⁷ The opinion of the District Court can be found at 667 F. Supp. 130.



to both applicants were legitimate offers, and were made in good faith. Defendant hired Dr. Keizer in part because he is black, and the student body at the time was becoming primarily black.

For the applicable standard, the Court cited Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-253 (1981), which held that once a plaintiff has established a prima facie case of discrimination "the burden shifts to the defendant to articulate a legitimate non-discriminatory reason for the employee's rejection" and that once the defendant has articulated such a reason, the plaintiff must prove that the defendant's reasons "were not its true reasons but merely a pretext for discrimination." Judge Motley concluded that, under this standard, plaintiff had failed to prove sex discrimination, stating (A9):

However, plaintiff has failed to meet her ultimate burden

of proving that defendant's articulated, legitimate, non-discriminatory reason for her rejection was a pretext for unlawful discrimination based on sex, or that she was not appointed as Associate Dean because she is a woman. Defendant showed that it avidly recruited and offered the position in good faith on two occasions to a qualified woman, Dr. Francis Minor, who declined the offer.

Defendant then offered the position to Dr. Keizer, a qualified black male, who accepted the position. Defendant did not discriminate against plaintiff because she is a woman by hiring Dr. Keizer.

The Court of Appeals for the Second Circuit unanimously affirmed on January 29, 1988. The Court stated "[t]he district



court's determination is not clearly erroneous and we see no reason to disturb it."⁸

THE WRIT OF CERTIORARI
SHOULD BE DENIED. THE
DISTRICT COURT, AS
AFFIRMED BY THE CIRCUIT
COURT OF APPEALS,
PROPERLY CONCLUDED
THAT PLAINTIFF HAD
FAILED TO CARRY HER
BURDEN TO PROVE SEX
DISCRIMINATION. SUCH
FINDING WAS NOT CLEARLY
ERRONEOUS.

The finding of the District Court that plaintiff failed to carry her burden of proof to demonstrate that she was discriminated against when defendant BMCC rejected her application for the position of Associate Dean of Faculty was supported by the evidence adduced at trial and was not clearly erroneous. Pursuant to the evidentiary

⁸ The opinion of the Court of Appeals is not reported. It can be found at page A3 of the Appendix to the Petition for a Writ of Certiorari.



standard restated by this Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), once the plaintiff has established a prima facie case of discrimination "the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the employee's rejection." Plaintiff then has the burden to "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were merely a pretext for discrimination, id., at p. 253." The defendant need not persuade the trier of fact of the reasons for the plaintiff's rejection, but must only produce sufficient evidence to "raise a genuine issue of fact as to whether it discriminated against the plaintiff." Id. at p. 254. Thus the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against



plaintiff, remains at all times with plaintiff."

Id. at p. 253.

Defendant BMCC met its burden of production through Dean Pollack's testimony that plaintiff was not qualified for the position of Associate Dean of Faculty. Although plaintiff had a doctorate and substantial teaching experience, she did not have the specific background necessary for the position. Dean Pollack testified that, at the time plaintiff applied for deanship, the college was seeking someone with a background in applied research, including statistical analysis. As stated in the November, 1972 letter (A83), plaintiff was rejected because she was deficient in this area. Further justification for plaintiff's rejection was offered by Dean Pollack's testimony, that, under the open admissions policy at BMCC, the change in the student body had given rise to a crisis situation



where a remediation expert was urgently needed to set up a program. Both Dr. Frances Minor, who was offered the position but declined, and Dr. Mervyn Kelzer, who accepted the job, had proven track records setting up remedial programs at other institutions.

The fact that BMCC had actively recruited and offered the position to a qualified woman, Dr. Frances Minor, was properly considered by the Court in support of its finding that plaintiff had failed to prove discrimination. The finding by the Court, based on the testimony of Dr. Minor, a disinterested witness, that the offer to her was legitimate, cannot be attacked as clearly erroneous. Connecticut v. Teale, 457 U.S. 440 (1982), relied on by plaintiff (Pl. Br., p. 37) is inapposite. In that case, this Court held that where a certain test requirement was facially discriminatory, it

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was not redeemed even if ultimately some black people were hired.

The District Court's finding, that plaintiff failed to carry her burden to prove that defendant's stated reasons for denying her the deanship were a pretext for discrimination, was not clearly erroneous. It is true, as plaintiff points out, that Dr. James testified that President Draper told him that he did not want to hire a woman for the position (A484-A485).⁹ Although the District Court opinion does not specifically

⁹ Plaintiff also points to the testimony of Duncan Pardue that former Dean Pollack referred to women as "cunts and bitches" (Pl. Br., p. 27). Significantly, Mr. Pardue, who was a social acquaintance of Dr. Pollack, testified that Dr. Pollack was having marital difficulties (T295) and admitted that he had never heard him refer to women at BMCC in those terms (B67). Thus, Mr. Pardue's testimony had little bearing on the case, and the Court's failure to give it any weight in the fact finding cannot be attacked as clearly erroneous.

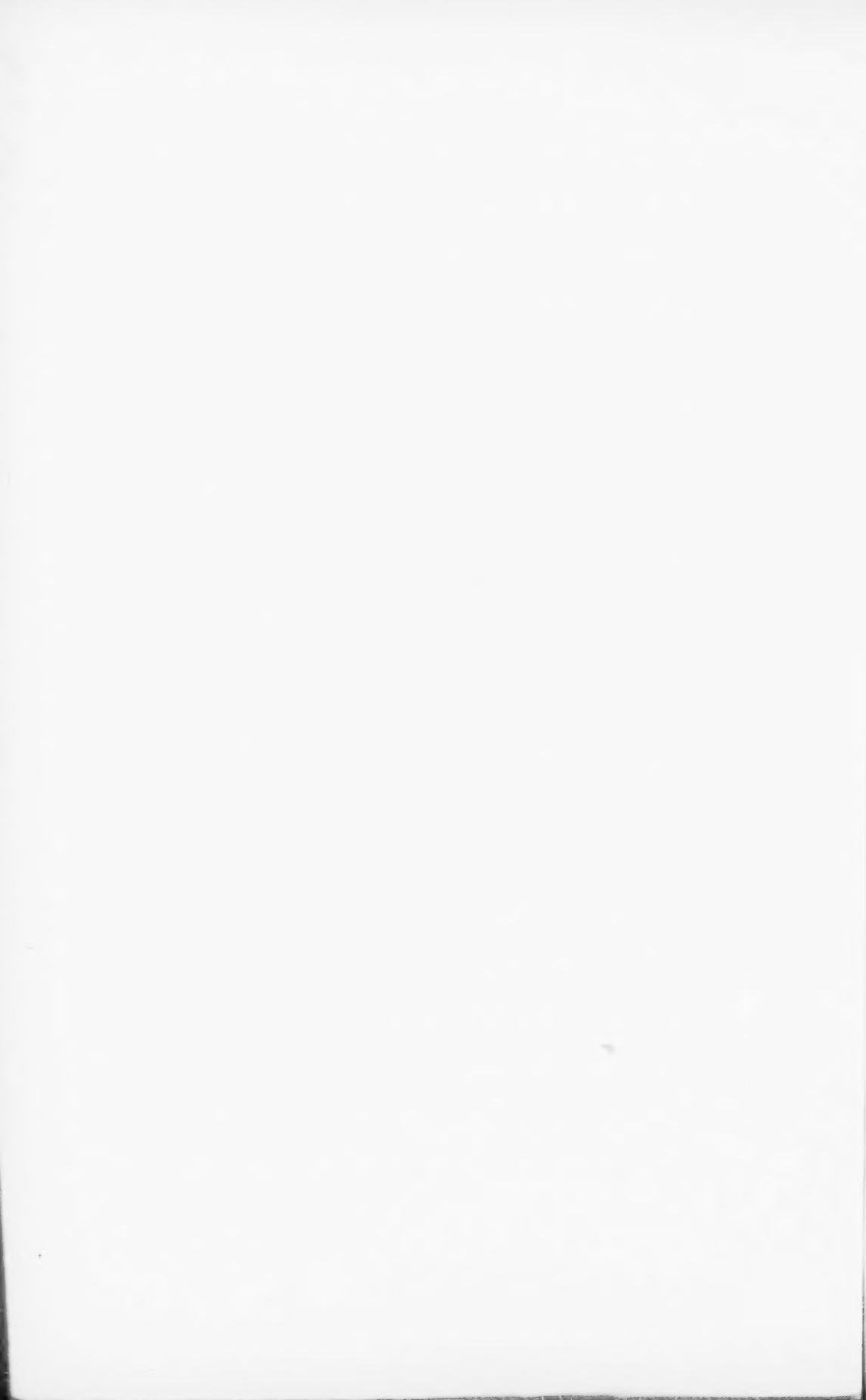


so state, it is self-evident that Judge Motley, as the trier of fact, rejected this testimony not being credible. Plaintiff relies on a number of cases from the 11th Circuit Court of Appeals which hold that where the District Court accepts "direct evidence" of discrimination offered by a plaintiff, the evidentiary standard reemphasized by this Court in Burdine, supra, does not apply. See, e.g., Thompkins v. Morris Brown College, 752 F.2d 558 (11th Cir., 1985). Plaintiff, relying on Thompkins v. Morris Brown College, supra and Lee v. Russell County Board of Education, 684 F2d 769 (11th Cir., 1982), contends that the District Court is required to state whether it accepts the "direct evidence." In the instant case, however, there plainly was no need for the District Court to specifically state that it did not credit Dr. James' testimony that Dean Pollack did not want to hire a woman. In



making a specific finding of fact that Dean Pollack had actively recruited another woman, Dr. Frances Minor, for the position, Judge Motley necessarily rejected Dr. James' testimony that Dean Pollack did not want a woman for the job.

Nor was the finding of the District Court herein that BMCC hired Dr. Kelzer "in part because he is black, and the student body at the time was becoming primarily black" (A7) clearly erroneous. Although former Dean Pollack did not testify explicitly that Dr. Kelzer's race was a factor, the District Court could reasonably conclude from Dr. Pollack's testimony about the change in the composition of the student body that Dean Pollack believed that a minority educator would be preferable to run the remedial program. The District Court inferred this from Dr. Pollack's testimony, stating, "In my judgment he said that, for



some reason, he didn't want to come out and say black people and Puerto Ricans. That is a hangup he has" (A588). This supportable inference was an entirely proper exercise of the District Court's fact finding function.

Plaintiff, who dropped her claim of race discrimination at trial, conceding that she did not have sufficient proof (A481), cannot revive this claim on appeal. Moreover, even if, arguendo, plaintiff's claim of race discrimination is considered, the law does not support plaintiff's claim that Dr. Kelzer's minority status was an improper factor in his selection. In Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), reh. den'd, 106 S. Ct. 3320 (1986) relied on by plaintiff, the Supreme Court, which held that the school board could not extend preference against layoffs based on race, noted that race can legitimately be a factor in employment decisions if the classification



serves a compelling governmental interest through means narrowly tailed to the goal. The choice of a highly qualified black administrator to supervise a remedial program for black students is plainly acceptable under the test in Wygant. See also Fullilove v. Klutznick, 448 U.S. 448 (1980).

As the issues raised by plaintiff are exclusively factual, there are no questions for review by this Court.



CONCLUSION

**THE PETITION FOR A WRIT
OF CERTIORARI SHOULD BE
DENIED, WITH COSTS.**

April 18, 1988

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